## 6. PROCUREMENT

#### **BASIC REQUIREMENT**

FTA grantees use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the process ensures competitive procurement and the procedures conform to applicable Federal law, including 49 CFR Part 18 (specifically Section 18.36) and FTA Circular 4220.1F, "Third Party Contracting Guidance."

#### AREAS TO BE EXAMINED

- 1. Procurement Policies and Procedures
- 2. Third-Party Contracts
- 3. Bus Testing

## APPLICABILITY OF REQUIREMENTS

As a general rule, where FTA funds are used in procurements for services or supplies, or where FTA funded facilities or assets are used in revenue contracts, FTA C 4220.1F applies. FTA funds, even operating assistance, can be segregated from local funds. FTA C 4220.1F does not apply to wholly locally funded capital procurements.

A grantee that is a state agency may follow its own procurement procedures but, at a minimum, must comply with the following statutory requirements:

- Provide full and open competition
- Include all applicable FTA clauses
- Comply with the Brooks Act if the state does not have a statute governing the procurement of architectural and engineering services
- Prohibit geographic preferences
- Comply with the five-year limitation on purchases of rolling stock or replacement parts
- Award only to responsible contractors

Instrumentalities of the state are considered state agencies. Regional transit authorities are not state agencies. If a triennial review is conducted of a state agency, the requirements in questions 2, 9, 13, 14, 15, 18, 22, and 27 apply.

Guidance on procurements of works of art and artist services is included in FTA C

4220.1F, Ch. IV, Section 2.g. and in FTA C 9400.1A, "Federal Transit Administration Design and Art in Transit Projects." In addition, FTA's "Best Practices Procurement Manual" includes extensive non-binding suggestions and advice on implementing FTA C 9400.1A and related provisions.

Procurements of real property consisting of land and any existing buildings or structures on that land are generally beyond the scope of FTA C 4220.1F. Real property acquisition is addressed in 49 CFR Part 24, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs." For further guidance, see also FTA C 5010.1D, "Grant Management Requirements."

Note on the Best Practices Procurement Manual — The Best Practices Procurement Manual (BPPM) is a good resource for grantees to use in conducting FTA-assisted procurements. However, it is only a guidance document and is not the source of any FTA requirements. Grantees may refer to the BPPM as a guide for the procurement process, but should not rely solely on the BPPM for ensuring that FTA requirements will be met. FTA requirements are found in the following sources: U.S. Code and Public Laws, Code of Federal Regulations, FTA Circulars, Dear Colleague Letters, and the Master Agreement.

## **COMPLIANCE**

If a grantee fails to comply with FTA procurement requirements, including in other procurement-related areas such as DBE, Buy America, and lobbying, FTA may decide to not participate in the procurement.

## **REFERENCE**

- 49 USC Chapter 53, Federal Transit Laws
- Transportation Equity Act for the 21<sup>st</sup> Century, Public Law No. 105-178
- 3. 49 CFR Section 18.36, "Procurement"
- FTA C 4220.1F, "Third-Party Contracting Guidance"
- 5. FTA C 5010.1D, "Grant Management Requirements"

- 6. FTA C 9030.1D, "Urbanized Area Formula Program: Program Guidance and Grant Application Instructions"
- 7. FTA Master Agreement
- 8. FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects"

## **USEFUL WEB LINKS**

FTA's Best Practice Procurement Manual

FTA Procurement Frequently Asked Questions

FTA Procurement Helpline

## QUESTIONS FOR THE REVIEW

1. Has FTA conducted a Procurement System Review (PSR) during the past two Federal fiscal years? If yes, when was the site visit? Is there a PSR scheduled for the current fiscal year?

#### **EXPLANATION**

As part of its oversight functions, FTA periodically conducts Procurement System Reviews (PSRs) of selected grantees.

Even if such a review is scheduled for the current Federal fiscal year or has been recently conducted, all questions in this section are still reviewed. If a PSR review has been recently conducted, obtain a copy of the most recent report (draft or final) for input into the triennial review.

#### **REFERENCE**

49 CFR 18.36 (g)

## **SOURCES OF INFORMATION**

The reviewer will review OTrak to determine if a PSR has occurred or has been scheduled. The reviewer will analyze findings and corrective actions from completed PSRs for input into the review process. The reviewer will obtain reports from the regional office, headquarters or OTrak.

## **DETERMINATION**

None

#### SUGGESTED CORRECTIVE ACTION

None

**2.** Does the grantee have written procurement policies and procedures?

#### **EXPLANATION**

The Common Grant Rule for non-governmental recipients requires the grantee to have written procurement procedures, and by implication, the Common Grant Rule for governmental grantees requires written procurement procedures as a condition of self-certification. Grantees are required to use their own procurement policies and procedures that reflect applicable state and local laws and regulations, provided that they conform to applicable Federal law. These policies and procedures must be followed when procuring materials and/or services using FTA funds.

The procurement policies and procedures are not required to be part of a single document. As such, the reviewer should request from the grantee all materials that may be relevant to the procurement area (e.g., municipal ordinances, operations manuals, employee handbooks, etc.). Procurement procedures may be included in general operating procedures. FTA C 4220.1F includes items that it expects written procedures to cover, such as nonrestrictive specifications, necessity, procurement methods, and resolution of third party contracting issues. Many of these items are addressed further in other questions within this section.

#### REFERENCE

49 CFR 18.36 (b)(1) FTA C 4220.1F, Ch. III, Section 3.a

#### SOURCES OF INFORMATION

The reviewer will examine the grantee's procurement policies and procedures to gain an understanding of processes and personnel involved in third party procurement actions.

#### **DETERMINATION**

The grantee is deficient if it does not have written procurement policies and/or procedures.

The grantee is deficient if it has policies and procedures, but has not followed them for FTA funded procurements.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office written procurement policies and procedures, along with a description of how they will be implemented. The grantee must cease immediately any practices that do not conform to applicable laws and regulations.

**3.** Does the grantee have written standards of conduct that address personal conflicts of interest, gifts and disciplinary actions?

#### **EXPLANATION**

Grantees are required to maintain written standards of conduct governing the performance of their employees engaged in the award and administration of contracts supported by Federal funds. The standards should:

 Preclude any employee, officer, agent, or board member or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing from participating in the selection, award, or administration of a contract supported with FTA assistance. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award.

- Include information that the grantee's officers, employees, agents or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The grantee may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.
- Provide for penalties, sanctions, or other disciplinary action for violation of such standards by the grantee's officers, employees, agents, board members, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.

#### REFERENCE

49 CFR 18.36 (b)(3) FTA C 4220.1F, Ch. III, Section 1

## **SOURCES OF INFORMATION**

The reviewer will examine the procurement policies and procedures and any other documents relevant to the procurement area to determine if standards of conduct are addressed. Standards of conduct may be in a separate policy adopted by the grantee's policy board or by state statute or local ordinance.

## **DETERMINATION**

The grantee is deficient if it does not have a written policy that addresses standards of conduct in the award and administration of a contract. The grantee is deficient if any required item of such a policy is missing.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office written standards of conduct which include all the required elements, along with evidence that the policy has been adopted and distributed to appropriate persons.

**4.** Does the grantee analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest?

## **EXPLANATION**

FTA expects grantees to analyze each planned acquisition in order to identify and evaluate potential

organizational conflicts of interest as early in the acquisition process as possible, and to avoid, neutralize, or mitigate potential conflicts before contract award.

An organizational conflict of interest occurs when any of the following circumstances arise:

- Lack of impartiality or impaired objectivity.
  When the contractor is unable, or potentially
  unable, to provide impartial and objective
  assistance or advice to the grantee due to
  other activities, relationships, contracts, or
  circumstances.
- Unequal access to information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
- Biased ground rules. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

#### **REFERENCE**

49 CFR 18.36 (c)(1) FTA C 4220.1F, Ch. VI, Section 2 .h

#### SOURCES OF INFORMATION

The reviewer will examine the grantee's procurement policies and procedures for a discussion of how organizational conflicts of interest are addressed. The reviewer will examine procurement files to determine how the grantee analyzes each procurement for organizational conflicts of interest. In addition to asking this question, during the site visit the reviewer will examine procurement files to determine if there are any potential organizational conflicts of interest. If a conflict of interest appears to exist in the procurement of goods or services, the reviewer will examine how the award was made.

#### **DETERMINATION**

The grantee is deficient if there is no evidence that it analyzes potential organizational conflicts of interest or a conflict of interest is identified.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office procedures that describe how potential conflicts of interest will be avoided.

5. Does the grantee require prospective bidders to prequalify for any of its procurements? If yes, how does the grantee ensure full and open competition?

## **EXPLANATION**

Grantees are not required to prequalify potential bidders. However, grantees that place such a requirement on potential bidders must adhere to FTA's requirements. If a grantee requires prospective bidders to prequalify, it must ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough sources to ensure full and open competition. Grantees must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).

Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step and qualifications-based procurements.

#### **REFERENCE**

49 CFR 18.36 (c)(4) FTA C 4220.1F, Ch. VI, Section 1.c

#### SOURCES OF INFORMATION

At the site visit, the reviewer will examine the grantee's list of prequalified persons, firms, and products. The reviewer will discuss the prequalification process with those who are responsible for it. The reviewer will examine solicitations to ensure that information related to prequalification is made available to potential bidders.

## **DETERMINATION**

The grantee is deficient if its list of prequalified firms is out of date, to the extent that full and open competition is impeded. The grantee is deficient If potential bidders are precluded from qualifying during the solicitation period.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit to the FTA regional office documentation demonstrating that deficiencies identified in its prequalification process have been corrected.

**6.** Do the grantee's procedures address required solicitation elements?

## **EXPLANATION**

Grantees must ensure that all solicitations incorporate a clear and accurate description of the material, product, or services being procured, as well as identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals. Descriptions must not contain features that unduly restrict competition. Detailed product specifications should be avoided. "Brand name or equal" descriptions should be avoided unless it is

impractical or uneconomical to make a clear and accurate description of the technical requirements.

#### REFERENCE

49 CFR 18.36 (c) (3) FTA C 4220.1F, Ch. VI, Section 2

## **SOURCES OF INFORMATION**

The reviewer will examine procurement policies and procedures to determine if solicitation elements are addressed. During the site visit, the reviewer will examine selected procurement files to review specifications.

#### **DETERMINATION**

The grantee is deficient if it uses noncompetitive specifications.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit to the FTA regional office procedures to ensure that all solicitations incorporate a clear and accurate description of the material, product, or services being procured as well as identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals. The grantee must cease any practice that violates FTA requirements.

**7.** Does the grantee have a procedure to review procurement requests to avoid duplicative or unnecessary purchases?

## **EXPLANATION**

Grantees' procedures must provide for a review of procurements to avoid purchasing unnecessary or duplicative items. During such a review, consideration should be given to consolidating or breaking out procurements or any other appropriate means to obtain a more economical purchase. An adequate system usually restricts the authority to initiate purchases to relatively few individuals. Also, all purchase requests typically would be reviewed and/or approved by one person, designated as the purchasing agent for a given department in the case of large grantees, or for the entire organization, in the case of small grantees. The value of a purchase may determine the procedures that the grantee follows. The level of scrutiny would be expected to increase with the dollar value of the purchase.

#### **REFERENCE**

49 CFR 18.36 (b)(4) FTA C 4220.1F, Ch. IV, Section 1.b

## **SOURCES OF INFORMATION**

The reviewer will examine the grantee's procurement procedures. During the site visit, the reviewer will

discuss the grantee's procurement procedures to determine if an adequate level of review is given each procurement. The reviewer will examine selected procurement files to verify that these procedures are being implemented.

#### **DETERMINATION**

The grantee is deficient if it is lacking procedures for reviewing procurements. The grantee is deficient If such procedures exist, but are not followed.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office procedures that include adequate review of procurements to avoid unnecessary or duplicative purchases. The grantee will be directed to provide the FTA regional office evidence that deficiencies in the implementation of such procedures have been corrected.

**8.** Does the grantee have written protest procedures?

#### **EXPLANATION**

Grantees must have written protest procedures to handle and resolve protests of award of its procurements. A grantee is to notify FTA when it receives a third party contract protest and keep FTA informed about the status of the protest. When a grantee denies a bid protest, and especially if an appeal to FTA is likely to occur, FTA expects the grantee to inform the FTA Regional Administrator for the region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly.

A protester must exhaust all administrative remedies before pursuing a protest with FTA. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five working days of the date when the protester has received actual or constructive notice of the grantee's final decision. Information on this process should be provided to those bidding on grantee procurements.

#### **REFERENCE**

49 CFR 18.36 (b)(12) FTA C 4220.1F, Ch. VII, Section 1

## SOURCES OF INFORMATION

Before the site visit, the reviewer will examine the grantee's procurement policies and procedures to determine if there are written protest procedures. During the site visit, the reviewer will examine solicitation documents in the grantee's procurement files for written protest procedures. The reviewer will ask the grantee if there have been any protests during

the review period. If so, the reviewer will request copies of all documentation described above (e.g., disclosure to FTA, written protest decisions, etc.).

## **DETERMINATION**

The grantee is deficient if it does not have written protest procedures. The grantee is deficient if written protest procedures exist, but are not followed, or if the it has not disclosed information regarding protests to FTA.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office written protest procedures and implement a process to provide FTA all information related to protests.

- **9.** How does the grantee allow for full and open competition for all transactions under the following methods of procurement?
  - a. Micro-Purchases (\$3,000 or less)
  - b. Small Purchases (more than \$3,000 but not more than \$100,000)
  - c. Sealed Bids/Invitation for Bid (IFB)
  - d. Competitive Proposals/Request for Proposals (RFP)
  - e. Architectural and Engineering Services (A&E)
  - f. Revenue Contracts

## **EXPLANATION**

Grantees must conduct procurement transactions in a manner providing full and open competition. Grantees are prohibited from restricting competition in Federally supported procurement transactions. Some situations that restrict competition include, but are not limited to: unreasonable qualification requirements, unnecessary experience requirements, excessive bonding, noncompetitive pricing practices between firms, noncompetitive awards to firms on retainer, organizational conflicts of interest, "brand name" only specifications, or any arbitrary action in the procurement process.

Micro-purchases may be made without obtaining competitive quotations if the grantee determines that the price to be paid is fair and reasonable. These purchases should be distributed equitably among qualified suppliers in the local area, and should not be split to avoid the requirements for competition above the micro-purchase threshold.

Small purchase procedures require that price or rate quotations be obtained from an adequate number of qualified sources (at least two). The solicitations and quotations may be either oral or written.

For items exceeding the Federal simplified acquisition threshold, currently fixed at \$100,000, sealed bids or competitive proposals are generally required.

- Sealed Bids/IFB Bids are publicly solicited and the award is made to the lowest (best price), responsive (meets all specifications), and responsible (is qualified to perform the work) bidder.
- Competitive Proposals/RFP Proposals are publicly solicited from an adequate number of sources and the award is made to the firm whose offer is most advantageous to the grantee, with price and other factors considered. Grantees must identify their evaluation factors and indicate the relative importance that each has towards the award.

Architectural and Engineering services must be procured using a qualifications-based process in accordance with the Brooks Act. Services subject to this requirement are program management, construction management, feasibility studies. design, preliminary engineering, architectural, engineering, surveying, mapping, and related services which lead to construction. Unlike other two-step procurement procedures, in which price is an evaluation factor, an offeror's qualifiations are evaluated to determine contract award. Price must not be considered during the selection phase in these procurements. Firms are selected based only on their qualifications. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the grantee may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the grantee determines is fair and reasonable.

Unless FTA determines otherwise in writing, a grantee may not use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. For design/build procurements, FTA expects the recipient to use the procurement method appropriate for the services having the greatest cost, even though the other necessary services would not typically be procured by that method.

Revenue contracts are those in which the grantee or subrecipient provides access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. If there are several

potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the grantee should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the grantee is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, FTA will work with the grantee to determine appropriate procedures, as necessary.

#### **REFERENCE**

49 CFR 18.36 (c)(1) 49 CFR 18.36 (d)(1)(2)(3) FTA C 4220.1F, Ch. VI, Section 1 FTA C 4220.1F, Ch. VI, Sections 3.a-f FTA C 4220.1F, Ch. II, Section 2(b)(4)

#### SOURCES OF INFORMATION

Before the site visit, the reviewer will examine the grantee's written procurement policies. During the site visit, the reviewer will examine procurement files, particularly legal notices and solicitation documents, to determine whether procurements have been conducted competitively. The reviewer will pay particular attention to product specifications to ensure that "brand name" specifications have been used appropriately (i.e., the grantee also must describe the product's salient characteristics in the specification). Records for phone solicitations may be examined when appropriate.

#### **DETERMINATION**

The grantee is deficient if it has not provided for full and open competition (has placed restrictive requirements on prospective bidders).

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office revised procurement procedures that ensure full and open competition in all procurement transactions. The grantee must cease immediately any practice that is in violation of FTA regulations.

**10.** Does the grantee maintain a written record of procurement history?

## **EXPLANATION**

Grantees must maintain records sufficient to detail the significant history of a procurement. At a minimum, such records must include:

- rationale for the method of procurement (i.e. request for proposals, invitation for bids, sole source)
- sole source justification for any purchase that is not competitive
- selection of contract type (i.e., fixed price, cost reimbursement)
- reason for contractor selection or rejection
- written responsibility determination for the successful contractor
- basis for the contract price. Each grantee must evaluate and state its justification for the contract cost or price.

The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements.

#### REFERENCE

49 CFR 18.36 (b)(9) FTA C 4220.1F, Ch. III, Section 3 (d)(1)

## **SOURCES OF INFORMATION**

At the site visit, the reviewer will examine procurement files for evidence of each of the items mentioned above. For most grantees, the procurement file will be the official record of the procurement history.

## **DETERMINATION**

The grantee is deficient if its procurement records do not contain a significant history for each procurement that was examined.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit to the FTA regional office evidence that the deficiencies identified in its record-keeping process have been corrected.

11. What is the grantee's system or procedure for administering contracts once awarded?

## **EXPLANATION**

Grantees are required to maintain a contract administration system that ensures contractors perform in accordance with the terms, conditions, and specifications contained in their contracts or purchase orders.

Many FTA grantees assign contracting duties to technical, financial, or management personnel. If the grantee lacks qualified personnel within its

organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the grantee, FTA expects the grantee to acquire the necessary services from sources outside the grantee's organization. When using outside sources, the grantee should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.

Although a grantee may not have written procedures addressing contract administration specifically, overall procurement procedures combined with a grantee's business practices may ensure adequate contract administration.

#### REFERENCE

49 CFR 18.36 (b)(2) FTA C 4220.1F, Ch. III, Section 3

#### SOURCES OF INFORMATION

Before the site visit, the reviewer will examine procurement policies and procedures to determine if there is an adequate contract administration system. During the review of specific procurement files, the reviewer will verify that these procedures are being implemented, and note any correspondence between the grantee and its contractors for evidence of ongoing contract administration.

#### **DETERMINATION**

If contractors have not performed according to the terms and conditions of their contracts, the grantee may be deficient depending on the extent to which it has taken remedial action. The grantee is deficient If non-performance of contractors is a persistent problem, or the grantee cannot provide any evidence of a contract administration system. Note: if contract administration appears to be an organizational problem (i.e., deficiencies in a contractor's performance with respect to maintenance, procurement, ADA, drug and alcohol, etc.), a deficiency in the technical area also may be warranted.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office documentation of an adequate contract administration system and/or evidence of remedial actions taken against contractors that have not performed in accordance with the terms and conditions of their contracts.

**12.** For a grantee that contracts for services funded with Federal monies or has passed through funding to a subrecipient, has the grantee included

competitive procurement requirements in its contract? How does the grantee monitor the procurement process of the contractor and/or subrecipient to ensure that Federal requirements are met?

## **EXPLANATION**

When a grantee has contracted out a portion of its Federally funded operation or has passed through funding to a subrecipient, competitive procurement requirements may apply to the contractor and/or subrecipient operations. In such circumstances, the procurement process of the contractor/subrecipient should meet Federal requirements contained in the Master Agreement, including Buv America. debarment and suspension. and lobbying requirements, which are in other areas of the review. Furthermore, a grantee needs to have a mechanism contractor/subrecipient compliance. Requiring written procurement procedures. overseeing selected procurement processes, and auditing the contractor/ subrecipient annually are measures that a grantee could use.

Typically, this requirement would apply to any thirdparty or subrecipient agreement in which the contractor or subrecipient performs primary project activities normally performed by the grantee directly.

## **REFERENCE**

FTA Master Agreement, Sections 2.d-e

## **SOURCES OF INFORMATION**

The reviewer will examine contracts and subrecipient agreements to ensure that they contain FTA third-party procurement requirements. The reviewer will determine how applicable contract clauses are implemented and who on the grantee staff monitors the contractor/subrecipient operations, including procurement. The reviewer will determine how the grantee monitors adherence to the requirements. The reviewer will ask how the grantee monitors the procurement process of a contractor/subrecipient and examine written reports or audit reports of the process.

## **DETERMINATION**

The grantee is deficient if the contractor or subrecipient is not following procurement standards and is not being monitored.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office with documentation that it has changed contract language to include procurement requirements when services are rebid or when a new subrecipient agreement is executed. The grantee will be directed to provide the FTA regional office with

documentation that it has implemented a procurement monitoring program.

**13.** Has the grantee included geographic preferences in any of its procurements?

#### **EXPLANATION**

Grantees are prohibited from specifying in-state or local geographical preferences, or evaluating bids or proposals in light of in-state or local geographic preferences, even if those preferences are imposed by state or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA grantee from limiting its bus purchases to in-state dealers. Exceptions expressly mandated or encouraged by Federal law include the following:

- Architectural and Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project. Although geographic preferences are permissible in procurements for A&E services, the reviewer should ensure that their use did not restrict competition (i.e., the use of geographic preference left only one or two qualified firms to bid on the contract).
- Licensing. A state may enforce its licensing requirements, provided that those requirements do not conflict with Federal law.
- Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in an area affected by a major disaster or emergency.

#### **REFERENCE**

49 CFR 18.36 (c)(1)(2) FTA C 4220.1F, Ch. VI, Section 2.a(4)(g)

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine procurement policies and procedures to see if there are requirements for geographic preferences. During the site visit, the reviewer will examine procurement files including solicitation documents to determine if procurements contain geographic preferences.

## **DETERMINATION**

The grantee is deficient if it has used geographic preferences in any procurement for other than one of the exceptions. The grantee is deficient if the use of geographic preferences in A&E procurements restricted competition.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide to the FTA regional office documentation of a revised procurement process which prohibits the improper use of geographic preferences. The grantee must cease any practice that violates FTA regulations.

**14.** Have applicable clauses been included in FTA funded procurements exceeding the micro-purchase limit and construction contracts over \$2,000? In intergovernmental agreements and subrecipient agreements, if applicable?

#### **EXPLANATION**

Grantees are required to include specific required clauses in FTA-funded procurements, intergovernmental agreements (e.g., those involving states and other public entities), and subrecipient agreements. The Master Agreement identifies certain clauses that apply to third-party contracts. Clauses addressing lobbying, debarment and suspension, DBE, and Buy America provisions are addressed in other sections of the triennial review.

FTA's Best Practices Procurement Manual (BPPM), Appendix A, also includes a discussion of Federally required and other model contract clauses. However, reviewers must NOT refer to the contents of the BPPM as FTA requirements. The BPPM is a guidance document only. Additional guidance is provided through FTA's Third Party Procurement Frequently Asked Questions website.

Grantees may not modify their own contracts after award to include Federal clauses and so make them eligible for procuring goods and services with Federal funds. Grantees may, however, modify the state GSA-type contracts to add Federal clauses when they issue orders against those state contracts.

Not all clauses apply to every contract. The applicability of clauses depends on the size and type of contract. Procurements above the micro-purchase thresholds must include all applicable FTA clauses as part of the solicitation, purchase order, or contract. A general reference to FTA regulations is not sufficient to meet this requirement.

A separate checklist of required clauses is provided in Exhibit 6.1, Part A. The checklist provides a citation from the Master Agreement for each required clause. Part B of Exhibit 6.1 lists certifications, reports, and forms that are required for DBE, Buy America, and Lobbying. Part C lists other required items to assist in determining whether the grantee's policies and procedures are actually being followed.

The applicability of FTA clauses to different types of procurements is shown in Exhibit 6.2. Note that the construction of ferry vessels using Federal funds is considered a public works project and therefore, the clauses related to construction contracts are applicable.

## **REFERENCE**

49 CFR 18.36 (i)(1-13)

49 CFR 18.36 (j-o)

29 CFR Parts 4 and 5, 41 CFR Parts 50-201 and 50-206, Amendments to Federal Contract Labor Laws by the Federal Acquisition Act Streamlining Act of 1994; Final Rule

Master Agreement

FTA C 4220.1F, Ch. IV, Section 2

FTA C 4220.1F, Appendix D

**Best Practices Procurement Manual** 

FTA Third Party Contracting FAQs

#### SOURCES OF INFORMATION

Before the site visit, the reviewer will examine written procurement procedures. During the site visit, the reviewer will examine procurement files for inclusion of required clauses.

#### DETERMINATION

The grantee is deficient if it has not included any reference to FTA requirements or any FTA clauses. Refer to the matrix in Exhibit 6.2 in determining the applicability of clauses in the future.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third-party contract clauses.

15. Does the grantee have any contracts for rolling stock and replacement parts that exceed five years in total length including base and options? If yes, identify.

## **EXPLANATION**

Grantees must not enter into contracts for rolling stock and replacement parts with a period of performance exceeding five years inclusive of options, extensions, or renewals. The five-year rule does not mean the grantee must obtain delivery, acceptance, or even fabrication in five years. However, the maximum quantity specified in such multi-year contracts must represent the grantee's reasonably foreseeable need. Typically, grantees use indefinite-delivery, indefinite-quantity (IDIQ) contracts for this type of purchase. While IDIQ contracts are permissible, they must meet the requirements described above.

Grantees may seek a waiver from the five-year requirement from FTA Headquarters. A copy of the written approval for this waiver must be in the applicable contract file.

## **REFERENCE**

49 USC 5307 (d)(1)(E)(i) FTA C 4220.1F, Ch. IV, Section 2. e(10)

#### **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine procurement procedures. During the site visit, the reviewer will examine procurement files for rolling stock and replacement part contracts to ensure that these meet the five-year contract term restriction.

#### DETERMINATION

The grantee is deficient if a contract represents more than five years' requirements. The grantee is deficient if it has a rolling stock and replacement parts contract with a period of performance exceeding five years and has not obtained prior FTA written approval.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office revised procurement procedures that include the five-year restriction on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The grantee will be directed to provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract that exceeds the five-year restriction.

**16.** Does the grantee perform an independent cost estimate before receiving bids or proposals?

## **EXPLANATION**

The independent cost estimate is a tool to assist in the determination of the reasonableness or unreasonableness of the bid or proposal being evaluated and is required for all procurements regardless of dollar amount. Independent cost estimates can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications, and prior data. The word "independent" does not imply that it is performed by someone other

than the grantee. This could be the case, however, if the grantee does not have the expertise for a large complex procurement.

The independent cost estimate is especially critical whenever there is no price competition (e.g., for architect-engineer procurements where only one price proposal is received), or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the agency when all competitors are submitting unreasonably high or low cost proposals.

## **REFERENCE**

49 CFR 18.36 (f)(1) FTA C 4220.1F, Ch. VI, Section 6

#### SOURCES OF INFORMATION

The reviewer will examine procurement files during the site visit to determine the extent to which the grantee conducts independent cost estimates. The reviewer will pay particular attention to sole source procurements.

#### DETERMINATION

The grantee is deficient if it has not conducted independent cost estimates.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of bids or proposals.

**17.** Does the grantee perform a cost or price analysis in connection with every procurement action, including contract modification?

## **EXPLANATION**

Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation. Cost analysis must be performed for procurements requiring the offeror to submit estimates for labor hours, overhead, and materials; procurements where adequate price competition is lacking; and sole source procurements unless price reasonableness can be established based on market prices. Price analysis (i.e., catalog or market prices) may be performed for all other procurements.

## **REFERENCE**

49 CFR 18.36 (f)(1) FTA C 4220.1F, Ch. VI, Section 6

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine the grantee's procurement policies. During the site visit, the reviewer will examine procurement files to determine the extent to which the grantee conducts cost and/or price analysis, and pay particular attention to sole source procurements.

#### **DETERMINATION**

The grantee is deficient if it has not conducted a cost or price analysis for every procurement action.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office documentation that it has updated its procurement process to include performing cost and price analysis for every procurement action including contract modifications.

18. What procedures does the grantee follow to ensure award to responsible contractors possessing the ability, willingness and integrity to perform successfully under the terms and conditions of the contract?

## **EXPLANATION**

SAFETEA-LU amended 49 U.S.C. Section 5325 to require FTA assisted contract awards be made only to "responsible" contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract. Responsibility is a procurement issue that is determined by the grantee after receiving bids or proposals and before making contract award. FTA expects the prospective contractor to demonstrate affirmatively to the grantee that it qualifies as "responsible" and that its proposed subcontractors also qualify as "responsible."

Factors to consider when making responsibility determinations include:

<u>Integrity and Ethics</u>. Has a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A).

<u>Debarment and Suspension</u>. Is neither debarred nor suspended from Federal programs under DOT regulations, "Nonprocurement Suspension and Debarment," 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4.

Affirmative Action and DBE. Is in compliance with the Common Grant Rules' affirmative action and DOT's Disadvantaged Business Enterprise requirements.

<u>Public Policy</u>. Is in compliance with the public policies of the Federal Government, as required by 49 U.S.C. Section 5325(j)(2)(B).

Administrative and Technical Capacity. Has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them, in compliance with 49 U.S.C. Section 5325(j)(2)(D).

<u>Licensing and Taxes</u>. Is in compliance with applicable licensing and tax laws and regulations

<u>Financial Resources</u>. Has, or can obtain, sufficient financial resources to perform the contract, as required by 49 U.S.C. Section 5325(j)(2)(D).

<u>Production Capability</u>. Has, or can obtain, the necessary production, construction, and technical equipment and facilities.

<u>Timeliness</u>. Is able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.

<u>Performance Record</u>. Is able to provide a satisfactory current and past performance record.

## **REFERENCE**

49 CFR 18.36 (b)(8) 49 USC Section 5325 FTA C 4220.1F, Ch. VI, Section 8 (b)

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine procurement policies and procedures for a discussion of responsibility determinations. Although a grantee may not have written procedures addressing these determinations specifically, overall procurement procedures combined with a grantee's business practices may ensure that adequate determinations are being made. During the review of specific procurement files the reviewer will verify that responsibility determinations are being made and note any correspondence between the grantee and its contractors for evidence of determinations.

#### **DETERMINATION**

The grantee is deficient If there is no evidence that grantees are making responsibility determinations prior to award.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office documentation of an implemented process to make adequate responsibility determinations prior to award of a contract.

19. Since the last review, were there any change orders to FTA funded contracts? If yes, describe in terms of numbers of change orders and dollars. What approvals are required? Were all change orders approved by authorized officials? Were all change orders eligible for FTA assistance?

#### **EXPLANATION**

A change order is an order authorized by the grantee directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor. Change orders must be approved by authorized grantee officials. Change orders are, in effect, sole source procurements. If project managers can approve change orders with minimal or no oversight, outside of normal procurement channels, potential problems may arise.

To be eligible for FTA assistance under the grantee's grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope.

#### REFERENCE

FTA C 5010.1D, Ch. III, 3.c FTA C 4220.1F, Ch. VII, Section 2 FTA Third Party Contracting FAQs

## **SOURCES OF INFORMATION**

The reviewer will examine the grantee's procedures for change orders. Large grantees are likely to have written change order procedures. Small grantees that have few procurements are less likely to have formal, written change order procedures. The reviewer will examine procurement files for approvals and justifications for any change orders.

The reviewer will consider the effect of change orders on clause and other thresholds. The reviewer will ensure that any change orders include clauses required by the new cumulative contract value. If necessary, the reviewer will ensure that the grantee obtained signed Buy America and lobbying certifications with the change order.

## **DETERMINATION**

The grantee is deficient if change orders occurred and there is not adequate supporting documentation. If the grantee did not consider the effect of change orders on other requirements (clauses, Buy America, lobbying), the deficiency will be noted in the respective area.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit change order procedures to the FTA regional office if the grantee has a history of change orders without any apparent change order procedures. The grantee will be directed to submit documentation that it has prepared required approvals and justifications missing from the files and that it has developed a process to ensure that future files are complete.

**20.** Has the grantee entered into any time and materials type contracts using FTA funds? If yes, identify.

#### **EXPLANATION**

Time and materials type contracts are those in which the contractor charges a single rate that includes overhead and profit for labor, and materials are billed at cost. Generally, the total value of a time and materials type contract is an indeterminate amount. As such, grantees are not permitted to use FTA funds for time and materials type contracts unless it determines that no other type of contract is suitable for the procurement. If time and materials type contracts are used, grantees must specify a ceiling price that the contractor shall not exceed except at its own risk.

#### REFERENCE

49 CFR 18.36 (b)(10) FTA C 4220.1F, Ch. VI, Section 2.c(2)(b)

## **SOURCES OF INFORMATION**

The reviewer will examine the grantee's procurement procedures. If the grantee indicates that it has used time and materials contracts involving FTA funds, the reviewer will examine the procurement files for these contracts for documentation supporting the grantee's decision to use a time and materials contract. The contract must specify a ceiling price.

## **DETERMINATION**

The grantee is deficient if FTA funds were used in a time and materials contract and the files do not support the grantee's decision or if there is no ceiling price specified in the contract.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time and materials contracts.

21. Has the grantee had any sole source, single bid, or brand name or equal awards since the last review? If yes,

identify. Do the files contain the appropriate justification and/or documentation for such awards?

#### **EXPLANATION**

FTA requires full and open competition in procurements for goods and services and encourages grantees to award contracts to the lowest responsive and responsible bidder. However, sole source, single bid, and brand name or equal awards can be used. In such situations, the grantee should have appropriate documentation for the award.

When the grantee requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the grantee may make a sole source award. When the grantee requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the grantee has made a sole source award that must be justified. The property or services are available from one source if one of the conditions described below is present:

- Unique or Innovative Concept. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the grantee only from one source and has not in the past been available to the grantee from another source.
- Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
- Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
- Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the grantee's needs.

In the case of a sole source award, the documentation should be a written sole source justification, which includes a cost analysis.

With a single bid, the documentation should include a cost analysis, as well as an explanation as to why a single bid was obtained. Upon receiving a single bid or proposal in response to a solicitation, the grantee

should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.

When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of a specific type of property. The grantee must identify the salient characteristics of the named brand that offerors must provide. When using a "brand name" specification, the grantee does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics.

A recurring problem has been the procurement of professional services. Often these services are procured with little or no competition. While such services can be procured on a sole source basis if justified, in general, a competitive environment does exist for professional services and the grantee needs to follow the requirements of FTA C 4220.1F when Federal funds are used to pay for these services.

#### **REFERENCE**

49 CFR 18.36 (d)(4) FTA C 4220.1F, Ch. III, Section 3.a(1)(e) FTA C 4220.1F, Ch. VI, Section 3.i

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine the grantee's procurement procedures. During the site visit, the reviewer will examine RFPs, IFBs, and other solicitation documents, bid evaluation files, and contracts. Additionally, the reviewer will examine policy board minutes for additional detail on these and other types of procurements. Although the grantee is not required to obtain prior FTA approval for a noncompetitive award, the grantee's files must contain an appropriate level of justification for such awards.

## **DETERMINATION**

The grantee is deficient if it does not have the appropriate documentation in the files to support the basis for the award. The grantee is deficient if professional services have not been bid competitively. The grantee is deficient if it has used "brand name" only specifications inappropriately.

#### SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit to the FTA regional office evidence of an implemented policy to ensure that future sole source procurements are properly documented. Where contracts are ongoing, the grantee will be directed not to exercise any options, possibly terminate the existing contract for convenience, and rebid for the required goods and services in accordance with Federal requirements.

When procurements exceeding \$100,000 have violated Federal requirements, the regional counsel will be advised.

**22.** Has the grantee conducted any piggyback procurements? If yes, identify. Is the appropriate documentation on file?

#### **EXPLANATION**

A grantee may find that it has inadvertently acquired contract rights in excess of its needs. The grantee may assign those contract rights to other grantees if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking." Although FTA does not encourage the practice, a grantee may find it useful to acquire contract rights through assignment by another grantee.

While it has become increasingly popular for grantees to acquire vehicles through this method of procurement, piggybacking can also occur for purchases of services and property. A grantee that obtains contractual rights through assignment may use them after first determining that the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. The grantee need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the grantee to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

FTA expects the grantee seeking the assignment to review the original contract to be sure that the quantities the assigning grantee acquired, coupled with the quantities the acquiring grantee seeks, do not exceed the amounts available under the assigning grantee's contract. Otherwise, the purchase is a "tagon" and is considered an improper sole source procurement.

Any changes in the vehicle must be within the original scope (i.e., no major changes in configuration or design). Although FTA has provided additional guidance in its *Best Practices Procurement Manual*, FTA has not developed a finite list of acceptable contract changes. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change includes a change from a high-floor to a low-floor vehicle. Changing an

engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, colors, exterior paint schemes, signage, floor covering, and other similar changes to be permissible changes.

Vehicles added to the base or option amounts originally specified are called "tag-ons." Tag-ons are not permitted. A tag-on is defined as the adding on to the contracted quantities (base and option) as originally advertised, competed, and awarded, whether for the use of the buyer or for others, and then treating the add-on portion as though it met the requirements of competition.

#### REFERENCE

FTA C 4220.1F, Ch. V, Section 7.a (2) Piggybacking Worksheet from FTA BPPM

#### SOURCES OF INFORMATION

The reviewer will examine the file of a piggyback procurement and the contract and correspondence between the two agencies involved in the piggyback arrangement to ensure that the original procurement contains an assignability clause and meets FTA requirements (e.g., competitive award, includes required clauses, required certifications filed, cost/price analysis conducted, five year contract term, etc.). The reviewer will ask the grantee if any changes to the vehicle were required and determine if these were within the original scope.

## **DETERMINATION**

The grantee is deficient if it cannot document that the original award contains an assignability clause, that vehicles are still available for assignment, or that FTA requirements were met. The grantee is deficient if the grantee conducted a "tag-on" purchase. The grantee is deficient if changes were beyond the original scope.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office with piggybacking procedures that comply with FTA requirements if an improper piggyback purchase has been made.

The grantee will be directed to provide revised procedures that address the requirements for a piggyback procurement and continue the process in accordance with Federal regulations or possibly terminate the agreement for convenience, in instances where an improper piggyback procurement is in process.

When significant procurements (i.e., exceeding \$100,000) have violated Federal requirements, advise the regional counsel.

23. Has the grantee used option clauses? If yes, identify. Were options evaluated at the time of the initial bid? Was the option price evaluated before it was exercised?

## **EXPLANATION**

Grantees may include options in contracts. If a grantee chooses to use options, the option quantities or periods in the bid must be evaluated in order to determine contract award. The price associated with exercising the option needs to be defined at the outset, either as a specific price or as a percentage increase of the base price. If the options have not been evaluated as part of the award, the exercise of the options is considered a sole source procurement.

A grantee also must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract award, and the grantee must determine that the option price is better than prices available in the market or the option is the more advantageous offer at the time it is exercised.

Note: If the option quantities on a rolling stock or replacement parts purchase appear to exceed the grantee's reasonably foreseeable needs, the grantee may be in violation of the five-year limitation (see Question 15).

#### **REFERENCE**

49 USC 5307 (d)(1)(E) FTA C 4220.1F, Ch. VI, Section 7.b and Ch. V, Section 7.a(1)

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine written procurement procedures. At the site visit, the reviewer will examine contracts and other procurement documents to determine whether options and periods of contract exceed the limits and whether options were priced, evaluated and are exercisable. In some cases, the grantee may have assigned options on a vehicle procurement to another party (i.e., "piggybacking"). In these cases, the reviewer will ensure that the options available to the grantee have been reduced by the number assigned to the other party.

#### **DETERMINATION**

The grantee is deficient if the options were not evaluated with the initial bid and were exercised. The grantee is deficient if options were assigned improperly to another grantee. The grantee is deficient if options are unpriced. The grantee is deficient if the options were established appropriately but were exercised without the requisite price analysis.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide to the FTA regional office a written assurance that it will not exercise the options unless FTA approval is granted for instances where options that violate the requirements have not been exercised. The grantee will be directed to develop procedures for complying with FTA requirements when exercising options in instances where the grantee has exercised options that were not evaluated and priced initially, or were assigned improperly to another grantee.

- **24.** Has the grantee used advance payments? If yes, identify. Was prior, written approval obtained from FTA headquarters?
- **25.** Were progress payments used? If yes, identify. Has the grantee obtained title of the property or taken alternative measures to protect FTA's interest?

## **EXPLANATION**

FTA does not authorize and will not participate in funding advance payments to a contractor without prior, written approval from the FTA regional office administering the project. A grantee may use its local share funds for advance payments. However, advance payments made with local funds before a grant has been awarded or before the issuance of a letter of no prejudice or other pre-award authority are ineligible for reimbursement.

FTA will allow progress payments if the payments are made to the contractor only for costs incurred in the performance of the contract. The grantee may use FTA assistance to support progress payments provided the grantee obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the grantee's financial interest in the progress payment.

#### REFERENCE

FTA C 4220.1F, Ch. IV, Sections 2.b(5)(b) and (c)

## **SOURCES OF INFORMATION**

Before the site visit, the reviewer will examine the grantee's written procurement procedures. During the site visit, the reviewer will discuss with the grantee and examine procurement files.

## **DETERMINATION**

The grantee is deficient if it has used advance payments without prior FTA approval. The grantee is deficient if it has made progress payments but has not obtained adequate security for those payments and does not have sufficient written documentation to substantiate the work for which payment was made.

## SUGGESTED CORRECTIVE ACTION

The grantee must cease any practice that violates FTA regulations. The grantee will be directed to report immediately to the FTA regional office any improper advance or progress payments with an explanation of the circumstances surrounding the payments. The grantee will be directed to submit to the FTA regional office proper procedures for advance or progress payments.

26. Has the grantee used liquidated damage clauses in any of its procurements? If yes, how is the damage rate specified in the contract? Were liquidated damages assessed in any FTA-funded contracts? If yes, were they credited to the project account?

#### **EXPLANATION**

Grantees are allowed to use liquidated damage clauses when there is a reasonable expectation of damages (increased costs on the project involved) from late completion or if weight requirements are exceeded and the extent or amount of such damages would be difficult or impossible to determine. Liquidated damage clauses may not be used to impose a penalty, limit or restrict competition, or in situations where delayed performance will not affect the grantee adversely. The rate and measurement of liquidated damages must be specified in the solicitation and contract. The procurement file should include a record of the calculation and rationale for the amount of the damages assessed.

The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. Any liquidated damages recovered should be credited to the project account involved unless FTA permits otherwise.

## REFERENCE

49 USC 5307 (d)(1)(E) FTA C 4220.1F, Ch. IV, Section 2.b(6)(b)1

## **SOURCES OF INFORMATION**

During the desk review, the reviewer will ask the regional office if FTA has been credited for liquidated damages and review grant files. Before the site visit,

the reviewer will examine the grantee's procurement procedures. During the site visit, the reviewer will examine procurement files (both solicitations and contract documents) for liquidated damage information. These types of clauses typically are found in large procurements of vehicles and equipment or in construction contracts.

#### **DETERMINATION**

The grantee is deficient if a damage rate is not specified in the contract or the grantee cannot provide a reasonable explanation regarding expected damages as a result of late completion. The grantee is deficient if it assessed liquidated damages, but did not credit these funds back to the project account.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to provide the FTA regional office a written procedure for correct use of liquidated damage clauses. If clauses are in existing contracts improperly, the grantee will be directed to modify the contract to eliminate the clause or provide a justification for the use and level of liquidated damages.

- **27.** Have buses been purchased or leased with FTA funds? If yes:
  - a. What is the bus model(s)?
  - b. Has this model already been Altoona tested?
    - If yes, was a copy of the test report received prior to final acceptance of the first vehicle and the expenditure of FTA funds?
    - If no, was a certification received from the manufacturer that the bus does not need to be tested?

#### **EXPLANATION**

A grantee purchasing buses must certify to FTA that any new bus model has been tested at the FTAsponsored test facility in Altoona, Pennsylvania. A new bus model is a bus design or variation of a bus design (usually designated by a manufacturer by a specific name and/or model number) that has not been in use in U.S. mass transit service prior to October 1, 1988, or that has been in service prior to that date but is being procured with a major change in configuration or components. Bus requirements apply to different mass transit vehicles including small vehicles, medium, and light-duty midsize buses, and heavy-duty small and large buses. A test must be conducted and a report received before the final acceptance of the first bus and the expenditure of FTA funds. Bus testing does not apply

to unmodified mass produced vans, bus prototypes, electric buses, or trolleybuses (meaning genuine trolleys, not replica trolleys popularly in use today).

## **REFERENCE**

49 CFR Part 665 Master Agreement Section 15.n(4) FTA C 9030.1D, Ch. VI, Section 4.d(3) Bus Testing Website

#### SOURCES OF INFORMATION

The reviewer will examine procurement procedures for a discussion of bus testing requirements. If the grantee has conducted a recent bus purchase, the reviewer will determine if the bus model was tested. A copy of the most recent list of models tested is available at the bus testing web site.

The reviewer will examine the procurement files for a bus purchase to ensure it contains information from the manufacturer regarding the particular vehicle's testing status. If the vehicle has been tested, the grantee should have a copy of the report in its files, regardless of whether or not the agency was the lead agency for the purchase, "piggy-backed" with another agency, or bought the vehicle off the state list.

#### **DETERMINATION**

The grantee is deficient if it has not included a certification for qualified buses, has not required bus testing, or has not received a test report. The grantee is deficient if buses were accepted or Federal funds expended prior to the receipt of the report.

## SUGGESTED CORRECTIVE ACTION

The grantee will be directed to submit to the FTA regional office documentation that it has changed its procurement procedures, and/or changed its bus acceptance procedures.

# Exhibit 6.1. A. REQUIRED THIRD-PARTY CONTRACT CLAUSES

(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE			
All FTA-Assisted Third-Party Contracts and Subcontracts					
No Federal government obligations to third- parties by use of a disclaimer		§2.f			
Program fraud and false or fraudulent statements and related acts		§3.f			
Access to Records		§15.t			
Federal changes		§2.c(1)			
Civil Rights (EEO, Title VI & ADA)		§12			
Incorporation of FTA Terms	Per FTA C 4220.1F	§15.a			
Energy Conservation		§26			
Ам	vards Exceeding \$10,000				
Termination provisions	49 CFR Part 18 Not required of states	§11			
Aw	vards Exceeding \$25,000				
Debarment and Suspension	2 CFR Parts 180 and 1200	§3.b			
Awards Exceeding the	Simplified Acquisition Threshold (\$100,000)				
Buy America	When tangible property or construction will be acquired	§14.a			
Provisions for resolution of disputes, breaches, or other litigation		§56			
Awards I	Exceeding \$100,000 by Statute				
Lobbying		§3.d			
Clean Air		§25.b			
Clean Water		§25.c			
Trans	port of Property or Persons				
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§14.b			
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§14.c			
Construction Activities					
Davis Bacon Act	Except for contracts <\$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market				

## Exhibit 6.1. A. REQUIRED THIRD-PARTY CONTRACT CLAUSES

(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE		
Copeland Anti-Kickback Act Section 1 Section 2	All Contracts >\$2,000	§24.a		
Contract Work Hours & Safety Standards Act	Contracts >\$100,000	§24.a		
Bonding for construction activities exceeding \$100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to:	§15.o(1)		
Seismic Safety	Contracts for construction of new buildings or additions to existing buildings	§23.e		
No	nconstruction Activities			
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) > \$100,000	§24.b		
	Transit Operations			
Transit Employee Protective Arrangements	Applies to Section 5307, 5309, 5311 and 5316 projects	§24.d		
Charter Service Operations		§28		
School Bus Operations		§29		
Drug and Alcohol Testing	Safety sensitive functions. Applies to Sections 5307, 5309 and 5311 projects.	§32.b		
Planning, Research, Development, and Documentation Projects				
Patent Rights		§17		
Rights in Data and Copyrights		§18		
Miscella	nneous Special Requirements			
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§12.d		
Prompt Payment and Return of Retainage	Per 49 CFR Part 26, if grantee meets the threshold for a DBE program	§12.d		
Recycled Products	Contracts for items designated by EPA, when procuring \$10,000 or more per year	§15.k		
ADA Access	Contracts for rolling stock or facilities construction/ renovation	§12.g		
Assignability Clause	Piggyback procurements	§15.a		

## Exhibit 6.1. A. REQUIRED THIRD-PARTY CONTRACT CLAUSES

(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE		
Special Notification Requirements for States				
Special Notification Requirements for States		§38		

## Exhibit 6.1 B. REQUIRED CERTIFICATIONS, REPORTS, AND FORMS (excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE
Bus Testing Certification and Report	Procurements of buses and modified mass produced vans	§15.n(4)
TVM Certifications	Procurements of buses and modified mass produced vans	§12.d(1)
Buy America Certification	Procurements of steel, iron or manufactured products > \$100,000	§14.a
Pre-Award Audit	Rolling stock procurements	§15.n(3)
Pre-Award Buy America Certification	Rolling stock procurements>\$100,000	§15.n(3)
Pre-Award Purchaser's Requirement Certification	Rolling stock procurements	§15.n(3)
Post-Delivery Audit	Rolling stock procurements	§15.n(3)
Post-Delivery Buy America Certification	Rolling stock procurements >\$100,000	§15.n(3)
Post-Delivery Purchaser's Requirement Certification	Rolling stock procurements	§15.n(3)
On-Site Inspector's Report	Rolling stock procurements for more than 10 vehicles for areas >200,000 in population and 20 for areas <200,000 in population	§15.n(3)
Federal Motor Vehicles Safety Standards Pre-Award and Post-Delivery Certification	Non-rail rolling stock procurements	§15.n(3)
Excluded Parties Listing System search	Procurements > \$25,000	§3.b
Lobbying Certification	Procurements > \$100,000	§3.d(1)
Standard Form LLL and Quarterly Updates (when required)	Procurements > \$100,000 where contractor engages in lobbying activities	§3.d(1)

# Exhibit 6.1 C. OTHER REQUIRED ITEMS

REQUIREMENT	COMMENTS	FTA C 4220.1F REFERENCES
Contract Administration System		Ch. III, §3
Record of Procurement History		Ch. III, §3.d(1)
Protest Procedures		Ch. VII, §1
Selection Procedures		Ch. III, §3d(1)(c)
Independent Cost Estimate		Ch. VI, §6
Cost/Price Analysis		Ch. VI, §6
Responsibility Determination		Ch. VI, §8.b
Justification for Noncompetitive Awards	If applicable	Ch VI, §3.i(1)(b)
No excessive bonding requirements		Ch. VI, §2.h(1)(f)
No exclusionary specifications		Ch. VI, §2.a(4)
No geographic preferences	Except for A&E services	Ch. VI, §2.a(4)(g)
Evaluation of Options	If applicable	Ch. VI, §7.b
Exercise of Options		Ch. V, §7.a

# Exhibit 6.2 APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES

(excluding micro-purchases, except for construction contracts over \$2,000)

	TYPE OF PROCUREMENT				
CLAUSE	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal government obligations to third-parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Energy Conservation	All	All	All	All	All
Termination Provisions (not required of states)	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000
Debarment and Suspension	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America			>\$100,000	>\$100,000	>\$100,000 (for steel, iron, manufactured products)
Provisions for resolution of disputes, breaches, or other litigation	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air
Davis Bacon Act				>\$2,000 (including ferry vessels)	
Copeland Anti-Kickback Act Section 1 Section 2				All >\$2,000 (including ferry vessels)	

# Exhibit 6.2 APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES

(excluding micro-purchases, except for construction contracts over \$2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock Purchase	Construction	Materials & Supplies
Contract Work Hours & Safety Standards Act		>\$100,000	>\$100,000	>\$100,000 (including ferry vessels)	
Bonding (not required of states)				>\$100,000 (including ferry vessels)	
Seismic Safety	A&E for New Buildings & Additions			New Buildings & Additions	
Transit Employee Protective Arrangements		Transit operations funded with Section 5307, 5309, 5311 or 5316 funds			
Charter Service Operations		All			
School Bus Operations		All			
Drug and Alcohol Testing		Transit operations funded with Section 5307, 5309 or 5311 funds			
Patent Rights	Research & Development				
Rights in Data and Copyrights requirements	Research & Development				
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Prompt Payment	All if threshold for DBE Program met	All if threshold for DBE Program met	All if threshold for DBE Program met	All if threshold for DBE Program met	All if threshold for DBE Program met
Recycled Products		Contracts for items designated by EPA, when procuring \$10,000 or more per year	-	Contracts for items designated by EPA, when procuring \$10,000 or more per year	Contracts for items designated by EPA, when procuring \$10,000 or more per year
ADA Access	Architectural & Engineering	All	All	All	
Special Notification Requirements for States	Limited to states	Limited to states	Limited to states	Limited to states	Limited to states